No. 92-1479

In the Supreme Court of the United States

OCTOBER TERM, 1993

MCDERMOTT, INC., PETITIONER

v.

AMCLYDE AND RIVER DON CASTINGS LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
DAVID V. HUTCHINSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

35 pp

QUESTION PRESENTED

In a tort action with multiple defendants brought under the general maritime law, whether the judgment against defendants who have not settled with the plaintiff should be reduced by the dollar amount of settlements the plaintiff reached with other defendants, or whether the judgment should be reduced by the settling defendants' proportional share of the plaintiff's damages as proved at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Statutes—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

This case presents an important question of federal admiralty law concerning the proper apportionment of damages in tort cases where the plaintiff has settled with some defendants but other defendants proceed to trial and judgment. The United States has a strong interest in that question because it is frequently a party to admiralty tort suits, including as a defendant in suits brought under the Suits in Admiralty Act, 46 U.S.C. App. 741-752, and the Public Vessels Act, 46 U.S.C. App. 781-790. Moreover, the United States has an interest in ensuring

that admiralty law, uniquely a subject of federal law, operates fairly and efficiently.

STATEMENT

1. This is a suit for damages to property brought under general federal maritime law. Petitioner purchased a 5000-ton marine "heavy lift" crane that was designed and manufactured by respondent AmClyde. Petitioner purchased the crane for use in moving the deck portion of an off-shore oil and gas exploration platform, which was located in the Gulf of Mexico off the coast of Texas. In order to move the deck, which weighed approximately 3950 tons, the crane was mounted on a barge situated next to the platform. As the crane lifted the deck, the equipment failed. One of the prongs on the crane's hook broke, causing one of the steel "slings" (cables) that held the deck to unravel. The deck fell and struck the barge, doing substantial damage to both the deck and the crane. Pet. App. A2-A3.

Petitioner then brought the present action in the United States District Court for the Southern District of Texas. Named as defendants in petitioner's contract and tort action were: AmClyde, the crane's designer and manufacturer; River Don, the subcontractor that manufactured the hook; the two manufacturers of the slings; and one of the sling manufacturers' suppliers. AmClyde in turn filed a cross-claim against petitioner for the cost of replacing the hook, as well as a third-party claim against Hudson Engineering, a subsidiary of petitioner that was responsible for designing the sling configuration used for the lift. Pet. App. A3.

Petitioner and the three so-called "sling defendants" (the two manufacturers and the supplier) set-

tled prior to trial for the sum of $1 million. At trial, the jury was informed that petitioner accepted responsibility for any negligence attributable to the sling defendants, Pet. App. A3, and the jury interrogatory seeking an apportionment of fault among the parties sought only a single, combined figure for petitioner and the sling defendants. Pet. App. A37. The jury returned a verdict for petitioner and awarded damages in the amount of $2.1 million. The jury apportioned responsibility for the accident as follows: petitioner and the sling defendants, 30%; respondent AmClyde, 32%; and respondent River Don, 38%. Pet. App. A4.

Respondents AmClyde and River Don requested that the $2.1 million damage award be reduced by $1 million, the amount received by petitioner in settlement from the sling defendants. The district court denied that request. The court concluded that it would be unjust for the settling defendants to pay $1 million when they were only 30% at fault, and for the non-settling defendants, who insisted on a trial and were collectively 70% at fault, to pay only $470,000. Pet. App. A52-A53. The district court therefore entered judgment against AmClyde in the amount of $672,000, which represented its 32% share of the $2.1 million verdict; and against River Don in the amount of $798,000, which represented its 38% share of the $2.1 million verdict. Pet. App. A3-A4.

2. On appeal, the court of appeals reversed the district court's allocation of damages.[1] Pet. App.

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[1] The court of appeals also concluded that petitioner's contract with respondent AmClyde precluded petitioner from

A25-A32. The court of appeals held that the district court erred in reducing the judgment against the non-settling defendants on a pro rata basis, *i.e.*, in an amount equal to petitioner's and the settling defendants' proportional share of responsibility for petitioner's damages. Although an earlier line of Fifth Circuit admiralty decisions indicated that the pro rata approach was appropriate, see, *e.g.*, *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (1979), a more recent line of that court's admiralty cases held that a pro tanto approach was required by Fifth Circuit law. See, *e.g.*, *Hernandez* v. *M/V RAJAAN*, 841 F.2d 582 (1988), certs. denied, 488 U.S. 981 and 488 U.S. 1030 (1989). Under the pro tanto rule, the plaintiff's damage award is reduced by the amounts recovered in settlement rather than by a figure reflecting the settling defendant's proportion of fault.[2] Pet. App. A25-A27.

In applying the pro tanto approach in this case, the court of appeals first reduced the $2.1 million jury verdict by 30%, the proportion of fault attributable to petitioner and the sling defendants. From that amount—$1.47 million—the court then deducted the gross amount of the $1 million settlement. Petitioner was thus entitled to damages of $470,000. Because River Don was the sole remaining defendant

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recovering against AmClyde in tort. Pet. App. A17-A18. Apart from its ruling on how properly to account for the settlement in allocating damages, no other aspect of the court of appeals' decision is before this Court.

[2] As a result of its decision absolving respondent AmClyde of tort liability, respondent River Don was left as the only defendant responsible for payment of any portion of petitioner's damages.

liable to petitioner in tort, the court of appeals ordered it to pay that amount to petitioner. Pet. App. A27, A29-A30. Thus, although the jury found that River Don was responsible for 38% of petitioner's $2.1 million in damages—or $798,000—its liability was limited to $470,000 as the result of petitioner's settlement with the sling defendants. Pet. App. A29-A30.

SUMMARY OF ARGUMENT

Courts and commentators have divided over the proper answer to the narrow question of federal maritime law presented in this case: How to account for a settlement when one or more defendants in a maritime tort suit enter into a settlement with the plaintiff and others choose to proceed to trial and judgment. Under the so-called pro rata approach, an amount reflecting the settling defendant's proportionate share of liability is deducted from the judgment against the remaining defendants. Under the pro tanto approach followed by the court of appeals in this case, the dollar amount of any settlement is deducted from the judgment against the non-settling defendants. We submit that the Court should adopt the pro rata approach.

A. In cases presenting questions of general maritime law, this Court has "taken the lead in formulating flexible and fair remedies in the law maritime." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). In this case, no Act of Congress or duly promulgated rule of general applicability constrains the Court's choice of the rule of decision. The Court is therefore free to follow its long-standing practice in maritime tort cases and adopt the most "just and equitable" rule under the circum-

stances. *The Schooner Catharine* v. *Dickinson*, 58 U.S. 170, 177-178 (1854).

B. The Court has already determined in *Reliable Transfer*, *supra*, that liability in maritime tort cases should be determined on the basis of comparative fault whenever possible. Consistent with comparative fault principles, the fairest and most efficient method for allocating funds paid in settlement by some, but not all, defendants in an admiralty tort case is the pro rata approach. The pro rata approach ensures that each party to a law suit—the plaintiff and each defendant—bears responsibility for the accident in proportion to its fault. The pro rata rule is both fair (because each defendant is responsible for his equitable share of the plaintiff's damages) and efficient (because it obviates the need for any ancillary proceedings to accomplish a comprehensive apportionment of damages).

Under the pro rata approach, the decision of one defendant to settle its dispute with a plaintiff has no impact on the position of any other defendant. Thus, no defendant's decision whether to settle is skewed by the decision of another defendant. And application of the pro rata rule does not alter the amount of damages a non-settling defendant will have to pay if it is found liable at trial. In contrast, under the pro tanto approach, the decision to settle made by the plaintiff and one defendant will often have a dramatic impact on the amount of damages the remaining, non-settling defendants pay if they are found liable. We see no reason why non-parties to a settlement agreement—over which they have no control—should be so affected.

C. The criticisms of the pro rata approach are unsound. Although the pro rata rule might deter a

plaintiff from entering into a settlement with one defendant out of fear that his recovery at trial will be less than it otherwise would be, that phenomenon is not unique to the multi-defendant context. Any time a plaintiff enters into a settlement, he forgoes the opportunity for a larger recovery in return for certainty and the advantages that go along with it. The fact that he will be held to his bargain should no more deter a plaintiff from settling with only one of several defendants than it might deter a plaintiff from settling with the sole defendant in a case.

The pro rata approach also preserves the plaintiff's incentives to settle if he can do so on fair terms. In this case, for example, the sum of petitioner's settlement and the remaining proportion of the judgment attributable to respondent River Don exceeded the amount that petitioner would have realized had the sling defendants litigated to judgment. Even if the converse were true, however, it would not necessarily follow that petitioner would be worse off for having settled. Because the settlement value of a case to a plaintiff represents the amount he hopes to win at trial—discounted by, among other factors, the probability of success at trial—it is wrong to equate dollars paid in settlement with dollars paid in satisfaction of a judgment. Even in cases where one party miscalculates and enters into an inadvisable settlement, there is no reason to assume that it will routinely be plaintiffs who do so. And there is, in any event, no injustice in holding that party to the terms of a bargain into which it freely entered.

D. The courts that have adopted the pro tanto approach in the admiralty setting have done so based

largely on their reading of this Court's decision in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). That case turned, however, on the provisions of the particular statutory scheme at issue there, and should not be read as establishing generally applicable principles of maritime law.

The issue in *Edmonds* was whether a shipowner that had been found liable to an injured longshore worker was entitled to pay only its proportionate share of the worker's damages. Under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, the employee was afforded an absolute right to recover statutory benefits from his stevedoring employer, but was barred from seeking further damages from his employer in a tort suit. Thus, the worker's employer could not be held liable in tort for its share of the worker's damages, and under the common law rule of joint and several liability the shipowner was left responsible for the worker's full damages. Based on its reading of the 1972 amendments to the LHWCA, the Court concluded that the shipowner was liable for the worker's full damages, even though it was only partially responsible for the accident.

The decision in *Edmonds* was not based on the reasonableness or fairness of the result. Rather, the Court was constrained by its reading of the LHWCA and by Congress's recent decision to amend that statute without disturbing the common law rule of joint and several liability. In the present context—unlike the situation in *Edmonds*, where the Court determined that part of the statutory bargain was that the shipowner, rather than the injured party, was to bear the burden of the statutory limitation on the

liability of the stevedore—there is no sound reason not to hold both plaintiffs and defendants to the terms of their settlement bargain.

ARGUMENT

WHEN THE PLAINTIFF IN A MARITIME TORT CASE SETTLES WITH SOME, BUT NOT ALL, DEFENDANTS PRIOR TO JUDGMENT, THE JUDGMENT SHOULD BE REDUCED IN ACCORDANCE WITH THE SETTLING DEFENDANTS' PROPORTION OF FAULT, RATHER THAN BY THE DOLLAR AMOUNT OF THE SETTLEMENT

Courts and commentators have divided in answering the narrow question presented in this case—how to account for a settlement when one or more defendants in a maritime tort suit enter into a settlement with the plaintiff and others choose to proceed to trial and judgment. Under the pro rata approach, an amount reflecting the settling defendant's proportionate share of liability is deducted from the judgment against the remaining defendants. See *Leger* v. *Drilling Well Control, Inc.*, *supra*; *Associated Electric Cooperative, Inc.* v. *Mid-America Transportation Co.*, 931 F.2d 1266 (8th Cir. 1991); *Amerada Hess Corp.* v. *Owens-Corning Fiberglass Corp.*, 1993 Ala. LEXIS 485 (Ala. May 14, 1993); *Stanley* v. *Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991); Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 4-15, at 146 (1987 & Supp. 1989); Yeates, Dye, & Garcia, *Contribution and Indemnity in Maritime Litigation*, 30 S. Tex. L. Rev. 215, 244-249 (1989); Note, *Effect of Settlement on Apportionment of Damages in Maritime Personal Injury Cases —Is It Worth the Gamble?*, 35 Loy. L. Rev. 439

(1989). Under the pro tanto approach followed by the court of appeals in this case, the dollar amount of any settlement is deducted from the judgment against the non-settling defendants.[3] See *Hernandez* v. *M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988), certs. denied, 488 U.S. 981 and 488 U.S. 1030 (1989); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988); Comment, *The Conflicting Doctrines of* Self *and* Leger: *The Unsettling Uncertainty of Settlement In Admiralty*, 41 Ala. L. Rev. 471 (1990).[4] We submit

[3] Courts adopting the pro tanto approach (which we do not urge) must also determine whether the non-settling defendants have a right of contribution against the settling defendant. For example, the Eleventh Circuit at first appeared to reject a right of contribution for non-settling defendants, see *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1545-1548 (1987), cert. denied, 486 U.S. 1033 (1988), but later held that contribution was appropriate. *Great Lakes Dredge & Dock Co.* v. *Tanker Robert Watt Miller*, 957 F.2d 1575, 1581 (11th Cir.), cert. denied, 113 S. Ct. 484 (1992). In our view, the manifest unfairness to non-settling defendants if they are not permitted to seek contribution under the pro tanto approach strongly militates in favor of the rule adopted in *Tanker Robert Watt Miller*. Although it is true that a settlement bar would strongly encourage settlements, that factor "cannot justify a legal rule that produces unjust results in litigation." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 408 (1975). See also note 9, *infra*.

[4] See also Restatement (Second) of Torts § 886A, comment m (1977). After describing the possible approaches, the Restatement declined to adopt any of them, on the ground that "[e]ach has its drawbacks and no one is satisfactory." *Ibid.* As we argue below (see Point B, *infra*), however, whatever

that this Court should adopt the pro rata approach.[5]

A. Under The General Maritime Law, This Court Should Adopt The Rule That Is Most "Just And Equitable" Under The Circumstances

In cases presenting questions of general maritime law, "Congress has largely left to this Court the responsibility for fashioning the controlling rules." *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963); see also *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990). In the absence of a controlling Act of Congress, the Court has "recognized its power and responsibility," *Fitzgerald*, 374 U.S. at 20, to "take[] the lead in formulating flexible and fair remedies in the law maritime." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). In discharging that obligation in tort cases, the Court has adopted the rule of decision that "[u]nder the circumstances [is] the most just and equitable, and * * * best

"drawbacks" the pro rata approach may have are insubstantial in the present context, especially in comparison with those of a pro tanto rule.

[5] The court of appeals appears to have applied a hybrid of the pro rata and pro tanto approaches: it deducted the dollar value of the settlement from petitioner's judgment against the non-settling defendant (a pro tanto procedure), but only after first reducing the amount of the judgment by a figure reflecting the settling defendant's proportionate share of fault (a pro rata procedure). Although the court of appeals' procedure thus amounted to "double counting," that was unavoidable in light of petitioner's decision to tell the jury that it accepted responsibility for the sling defendants' share of fault, rather than seeking a jury interrogatory specifying its share of fault as well as that of the sling defendants. See Pet. App. A27.

tend[s] to induce care and vigilance on both sides, in the navigation." *The Schooner Catharine* v. *Dickinson*, 58 U.S. 170, 177 (1854); see also *Reliable Transfer*, 421 U.S. at 402-403. In the present case, it is undisputed that no Act of Congress or duly promulgated rule of general applicability constrains the Court's choice of the rule of decision that is most "just and equitable" under the circumstances.[6]

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[6] Although Congress has not spoken to the question presented here, it has generally favored comparative negligence principles in allocating maritime liability, see, *e.g.*, Jones Act, 46 U.S.C. 688; Death on the High Seas Act, 46 U.S.C. 766—at least where there has been no policy judgment that workers are entitled to payment for every injury in return for a reduced amount of benefits. See Longshore and Habor Workers' Compensation Act, 33 U.S.C. 901; *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Moreover, in Section 122(g)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9622(g)(5), Congress provided that payments made by one responsible party in settlement of liability under that statute "reduce[] the potential liability of [other responsible parties] by the amount of the settlement." In that context, Congress made the judgment that the statutory objective of fully funding the actual costs of environmental clean-up projects was paramount.

In other contexts, as in maritime cases, the federal courts have generally divided on whether a pro rata or pro tanto apportionment is preferable. See, *e.g.*, *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (adopting pro rata approach in securities litigation); *Singer* v. *Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989) (adopting pro tanto approach in securities litigation). See also *Texas Industries* v. *Radcliff Materials*, 451 U.S. 630 (1981) (no implied right to contribution among co-conspirators under the antitrust laws); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981) (no implied right to contribution under Title VII of the Civil Rights Act of 1964).

Although no Act of Congress or decision of this Court is controlling here, the Court has established principles that point to an appropriate disposition of this case. Specifically, the Court has recognized that principles of comparative fault generally should be utilized in assessing tort damages in admiralty cases. In *Reliable Transfer*, the Court was faced with the question whether to abandon the venerable common law admiralty rule of divided damages. Under that rule, so long as both parties to a collision between vessels were partially at fault, both were responsible for one-half of the resulting damages, regardless of the parties' relative degrees of fault.[7] Concluding that the rule of divided damages "produces palpably unfair results" in every case where each party was not equally at fault, the Court abandoned that rule in favor of a system of comparative fault, under which each party is responsible for damages in proportion to its degree of fault. 421 U.S. at 405. Rejecting the rule of divided damages, the Court concluded, would not unduly deter settlements, because "[e]xperience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." *Id.* at 408. Thus, the Court held that liability for

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[7] The rule of divided damages was a longstanding doctrine that originally was applicable only in collision cases. See *Reliable Transfer*, 421 U.S. at 400 n.1 (quoting *The Sapphire*, 85 U.S. 51, 56 (1873), and *The North Star*, 106 U.S. 17, 22 (1882). As the Court noted in *Reliable Transfer*, however, the rule had been extended to all cases in which a vessel had been damaged, regardless of whether the damage was caused by collision with another vessel. *Ibid.*; see also G. Gilmore & C. Black, *The Law of Admiralty* § 7-17, at 522-523 (2d ed. 1975).

damages in admiralty tort cases should be "allocate[d] * * * according to comparative fault whenever possible," in order best to achieve a "just and equitable" division of damages among tortfeasors. *Id.* at 411.[8]

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[8] In determining how best to apportion liability among maritime defendants, this Court has adopted what it finds to be the most equitable and efficient rule, without reference to state law. See *United States* v. *Reliable Transfer, supra*; *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974). To the extent, however, that the general tort law of the States is relevant, see *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990); *Moragne* v. *States Marine Lines, Inc.*, 398 375 (1970), that body of law is divided.

Consistent with Section 6 of the Uniform Comparative Fault Act (1977), a number of States have adopted, either through statute or common law, a rule reducing the plaintiff's award by an amount reflecting the settling defendant's equitable share of the plaintiff's damages. See Colo. Rev. Stat. Ann. § 13.50.5.105(a) (West 1992); Conn. Gen. Stat. Ann. § 52.572h(n) (West 1991); Iowa Code Ann. § 668.7 (West 1987); Ky. Rev. Stat. Ann. § 411.182(4) (Michie/Bobbs Merrill 1992); La. Civ. Code Ann. art. 1803 comment (b) (West 1992); *Frederickson* v. *Alton M. Johnson Co.*, 402 N.W.2d 794, 797 (Minn. 1987) (en banc) (but see Minn. Stat. Ann. § 604.01 (West 1988) (previously adopting contrary rule)); Neb. Rev. Stat. § 25-21,185 (1989); *Young* v. *Latta*, 589 A.2d 1020, 1024 (N.J. 1991); New Mexico Stat. Ann. § 41.3A.1 (Michie 1978); Utah Code Ann. § 78.27.40 (1992); *Peiffer* v. *Allstate Insurance Co.*, 187 N.W.2d 182, 185 (Wis. 1971).

On the other hand, a larger number of States have adopted, again by statute or common law, the pro tanto approach of Section 4 of the Uniform Contribution Among Tortfeasors Act (1955). See *John Crane-Houdaille, Inc.* v. *Lucas*, 534 So.2d 1070, 1073 (Ala. 1988); Ariz. Rev. Stat. Ann. § 12.2504 (1992); Ark. Code Ann. § 16.61-204 (Michie 1987); Cal. Civ. Proc. Code § 876 (West 1980); Del. Code Ann. tit. 10, § 6304

B. The Pro Rata Approach Is The Fairest And Most Efficient Method For Allocating Damages When Some, But Not All, Defendants Settle In A Maritime Tort Case

In *Leger* v. *Drilling Well Control, Inc.*, *supra*, the Fifth Circuit recognized that "[t]he reasoning of

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(1975); Fla. Stat. Ann. § 768.31(5) (West 1986); *Hendricks* v. *Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1508 (11th Cir. 1985) (interpreting Georgia law); *King Cotton, Ltd.* v. *Powers*, 409 S.E.2d 67 (Ga. App.), cert. granted, 1991 Ga. LEXIS 884 (Ga. 1991); Haw. Rev. Stat. § 663.14 (1988); Idaho Code § 6.805 (1989); Ill. Ann. Stat. ch. 740, para. 100/2(c) (Smith-Hurd 1993); *Indiana State Highway Commission* v. *Morris*, 528 N.E.2d 468, 473 (Ind. 1988); Kan. Civ. Proc. Code Ann. § 60-258a (Vernon 1983); Maine Rev. Stat. Ann. tit. 14, § 163 (West 1980); Md. Ann. Code art. 50, § 19 (1992); Mass. Ann. Laws ch. 231B, § 4 (Law. Co-op. 1992); Mich. Comp. Laws. Ann. § 27A.2925(4) (West 1981); Mo. Ann. Stat. § 537.060 (Vernon 1991); *Kuhnke* v. *Fisher*, 740 P.2d 625, 629-630 (Mont. 1987); Nev. Rev. Stat. Ann. § 41.141 (Michie 1986); N.H. Rev. Stat. Ann. § 507:7-b (1983); N.C. Gen. Stat. § 1B.4 (1992); N.D. Cent. Code § 32.38.04 (1976); *Schneider* v. *Warren*, 500 N.E.2d 356, 358 (Ohio App. 1985); Okla. Stat. Ann. tit. 12, § 832(H) (West 1988); Or. Rev. Stat. Ann. § 18.455 (1988); Pa. Stat. Ann. tit. 42, § 8326 (1992); R.I. Gen. Laws § 10.6.7 (1992); S.C. Code Ann. § 15.38-50 (Law. Co-op 1992); S.D. Codified Laws Ann. § 15.8.17 (1984); Tenn. Code Ann. § 29.11-105 (1992); Tex. Rev. Civ. Stat. Ann. art. 2, § 33.012 (West 1993); Va. Code Ann. § 8.01-35.1(A)(1) (Michie 1992); Wash. Rev. Code Ann. § 4.22.606 (West 1988); *Kodym* v. *Frazier*, 412 S.E.2d 219 (W. Va. 1991). Several of these States, however, do not follow a comparative fault system for determining liability in the first instance. See *Knight* v. *Alabama Power Co.*, 580 So.2d 576 (Ala. 1991); *Board of Trustees* v. *RTKL Assocs., Inc.*, 559 A.2d 805, 810 (Md. Ct. Spec. App. 1989); *Dunbar* v. *City of Lumberton*, 414 S.E.2d 387 (N.C. App. 1992); *Litchford* v. *Hancock*, 352 S.E.2d 335, 337 (Va. 1987); see also *McIntyre* v. *Ballentine*, 833 S.W.2d 52 (Tenn. 1992) (aban-

Reliable Transfer loses none of its cogency * * * simply because one or more of the potential defendants has settled with the injured party." 592 F.2d at 1249. Consistent with the comparative fault principles adopted in *Reliable Transfer*, then, the fairest and most efficient method for taking account of funds paid in settlement by some, but not all, defendants in an admiralty tort case is the pro rata approach.

The pro rata approach assures that each joint tortfeasor is held responsible for the share of the plaintiff's damages it caused—no more and no less. Because each defendant can be exposed to no more than its proportionate share of the plaintiff's damages, non-settling defendants will have no occasion to seek contribution from the settling defendants.[9] Nor will

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doning contributory negligence system in favor of modified comparative fault system); *Nelson* v. *Concrete Supply Co.*, 399 S.E.2d 783 (S.C. 1991) (same).

Two States have adopted a hybrid approach. Mississippi uses the pro rata approach only if the settling tortfeasor has paid less than its equitable share of the plaintiff's damages. Miss. Code Ann. § 85-5-1 (1973). New York reduces the plaintiff's award by the dollar amount of the settlement or the settling tortfeasor's proportion of liability, whichever is greater. N.Y. Gen. Oblig. Law § 15-108 (McKinney 1993). Finally, neither Alaska nor Vermont appears to have adopted a particular approach.

[9] One version of the pro tanto approach—under which the settling defendant receives a release from the plaintiff and the non-settling defendants have no right of contribution—also makes further litigation over contribution unnecessary. As we have noted (see note 3, *supra*), however, it does so at the price of manifest unfairness to non-settling defendants, who will be forced to "bear the risk that the plaintiff settled for too little." *Great Lakes Dredge & Dock Co.* v. *Tanker Robert Watt Miller*, 957 F.2d 1575, 1582 (11th Cir. 1992).

non-settling defendants have any incentive to question the good faith or reasonableness of a settlement entered into by the plaintiff and other defendants.[10] In short, the pro rata approach is both fair (because each defendant is responsible for his equitable share of the plaintiff's damages) and efficient (because it obviates the need for any ancillary proceedings to accomplish a comprehensive apportionment of damages).

The rule we advocate is efficient for another reason as well: It preserves the incentives of parties to settle their disputes. Under the pro rata approach, the normal incentives in favor of settlement are preserved. Defendants have an interest in reaching a settlement with the plaintiff because they are assured that any settlement will close the matter. There is no danger that they will be forced to defend actions for contribution or respond to allegations that the settlement was unreasonable or collusive.[11] Under the pro tanto approach, by contrast, a defendant would often be deterred from entering into a settle-

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[10] Because of the danger of collusion, it is generally recognized that the pro tanto approach (without contribution) requires that settlements be entered into in good faith. See Restatement (Second) of Torts § 886A, comment m. As a result, any efficiency gain derived from barring an action for contribution would be offset by the potential for litigation over the *bona fides* of the settlement. See *Tanker Robert Watt Miller*, 957 F.2d at 1582.

[11] Non-settling defendants, however, will still face the possibility of further litigation in actions for contribution among themselves, see *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), thus providing a further incentive to settle.

ment because of the distinct likelihood that it will be subject to a future action for contribution.

In sum, under the pro rata approach, the decision of one defendant to settle its dispute with a plaintiff has no impact on the position of any other defendant. The pro rata approach does not skew the non-settling defendant's decision whether to settle. And it does not affect the amount of damages a non-settling defendant will have to pay if it is found liable at trial. In contrast, under the pro tanto approach, the decision to settle made by the plaintiff and one defendant will often have a dramatic impact on the amount of damages the remaining, non-settling defendants must pay if they are found liable. In this case, for example, the court of appeals' decision reduced respondent River Don's liability to petitioner from $798,000 to $470,000—solely as the result of a settlement agreement that it had no part in negotiating and to which it was not a party.[12] In our view, that result makes little sense, especially in comparison with the pro rata approach, which appropriately places the benefits and burdens of a settlement on the parties to it.

C. The Criticisms Of The Pro Rata Approach Are Unsound In This Setting

1. The pro rata approach has been criticized on two grounds. First, it is said to "work[] strongly

[12] Under the court of appeals' holding, the dollar amount of petitioner's recovery would total $1.47 million (the sum of the sling defendants' settlement and River Don's $470,000 liability). Under the pro rata approach we urge, petitioners recovery would total $1.798 million (the sum of the sling defendants' settlement and River Don's share of the $2.1 million jury verdict.)

against the interest of the injured party and [to] have the effect of discouraging him from entering into a settlement." Restatement (Second) of Torts § 886A, comment m (1977). Second, the pro rata approach is said to interfere with the plaintiff's entitlement "to receive a full damage award less any amount he recovered in a settlement." *Hernandez* v. *M/V RAJAAN*, 841 F.2d 582, 591 (5th Cir. 1988), certs. denied, 488 U.S. 981 and 488 U.S. 1030 (1989); see also *Constructores Tecnicos* v. *Sea-Land Serv., Inc.*, 945 F.2d 841, 850 (5th Cir. 1991) (plaintiff not entitled to "recover more than the damages determined at trial"). Neither criticism, in our view, is sound.

Although it is true in theory that the pro rata approach might deter a plaintiff from entering into a settlement with one defendant out of fear that his recovery at trial will be less than it otherwise would be, we fail to see why that phenomenon is unique to the multi-defendant context. As one court has observed, "[a] plaintiff considering settlement must always consider the possibility that settlement will yield less than litigating a cause to completion." *Stanley* v. *Bertram-Trojan, Inc.*, 781 F. Supp. 218, 224 (S.D.N.Y. 1991). Any time a plaintiff enters into a settlement, he forgoes the opportunity for a larger recovery in return for certainty and the advantages that go along with it.[13] The fact that he will be held

[13] The decision to settle is controlled by a variety of factors that must be considered by both the plantiff and the defendant—including the amount of an expected judgment if the case goes to trial, the probability of success at trial or on appeal, the costs of litigating to judgment, the costs of settlement, and the parties' relative risk averseness. See Richard A. Posner, *Economic Analysis of Law* § 21.5, at 554-560 (4th ed. 1992).

to his bargain—including its benefits and detriments—should no more deter a plaintiff from settling with only one of several defendants than it might deter a plaintiff from settling with the sole defendant in a case. In either situation, the plaintiff is free to settle or not, in the exercise of his best judgment.

Moreover, the pro rata approach gives the plaintiff an incentive to settle if he believes he can do so on favorable terms. As things turned out at the trial in this case, the $1 million settlement petitioner reached with the sling defendants exceeded the proportion of the $2.1 million jury verdict for which those defendants might have been found responsible had they litigated to judgment.[14] In other words, the sum of petitioner's settlement and the remaining proportion of the judgment attributable to River Don exceeded the amount that petitioner would have realized had the sling defendants litigated to judgment. Petitioner thus apparently was able to negotiate a disproportionately favorable settlement with the sling defendants, and of course had every incentive to do so.

Even if a plaintiff is unable to secure a settlement that disproportionately rewards him, however, he nonetheless has every incentive to reach a fair settlement with any defendant. Under the pro rata approach, regardless of the terms of a settlement, a plaintiff who succeeds at trial is assured of a recovery from each defendant in proportion to that

[14] The jury aggregated the degree of fault attributable to petitioner and the sling defendants, and reached a figure of 30%. See Pet. App. A35. Thus, according to the jury's verdict, the maximum amount sling defendants would have been found liable for if they had not settled was $630,000 (30% of the $2.1 million verdict).

defendant's share of fault. See *Leger*, 592 F.2d at 1250. Thus, the plaintiff can be worse off for settling only if the value of the share of the judgment that is attributable to the settling defendant exceeds the amount of the settlement he has reached with that defendant.

Further, it is overly simplistic to view every plaintiff in such circumstances as "worse off," because it is erroneous to equate dollars paid in settlement with dollars paid in satisfaction of a judgment. Because the settlement value of a case to a plaintiff represents the amount he hopes to win at trial—discounted by, among other factors, the probability of success at trial—it is by no means clear that the plaintiff who realizes less in absolute dollars in a settlement than he would have realized at trial has made a bad deal. See Richard A. Posner, *supra*, at § 21.5, pp. 554-560. The plaintiff has traded his chance for a larger recovery against that defendant in return for a certain recovery without the costs of litigation.

The same is true from the perspective of the settling defendant. As the Fifth Circuit recognized in *Leger*, "[a]ny amounts received in settlement are discounted both by plaintiff and defendant to take into account the risks and rewards of going to trial." 592 F.2d at 1250 n.10. Thus, while in hindsight it might appear in this case that the sling defendants settled with petitioner on unfavorable terms, that is not at all clear from a pre-trial perspective. Before trial, any number of factors could have led the sling defendants to decide that the settlement here was in their interest: They might have overestimated the amount of petitioner's damages or their share of responsibility for the accident, as compared with what the jury ultimately determined; or they might

have determined that the costs of trying the case and any subsequent appeals made it more economical to settle; or they might simply have been highly risk averse. In any event, the result at trial—although perhaps other than what the sling defendants anticipated—gave them no cause for complaint.[15]

Thus, there should be nothing troubling about the possibility that a plaintiff who makes a favorable settlement might be "paid for more than its injury," Pet. App. A27. See also *Associated Electric Cooperative, Inc.*, 931 F.2d at 1271. As we have noted, that may or may not be the case, depending on the relative economic judgments made by the parties to the settlement when they entered into it. Moreover, even granting that the parties to a settlement sometimes miscalculate its value, there is no reason to assume that plaintiffs or defendants will more often be the parties who err. "Because some settlements are more favorable than others," *ibid.*, it will frequently be the case that plaintiffs realize more or less from a settlement than the damages they would have received if they had gone to trial against all defendants. In either event, the result is simply the product of a bargain into which both parties freely entered.

2. Furthermore, the weaknesses in the pro tanto approach outweigh whatever force the criticisms of the pro rata rule might reasonably be thought to have. First, the pro tanto approach is "potentially

[15] Because the parties to a settlement should be held to their bargain, under the pro rata approach a defendant whose settlement represents a disproportionate share of the plaintiff's damages as proven at trial should not be entitled to indemnity or contribution from its co-defendants, absent an agreement among them to the contrary. See Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-15, at 154 n. 52 (1987 & Supp. 1989).

unfair to all of the involved parties." Thomas J. Schoenbaun, *supra* § 4-15, at 24 (Supp. 1989). It is unfair to the non-settling defendant, who bears the risk that the plaintiff settled with other defendants for less than their proportionate share of liability—although that unfairness concededly is mitigated if the non-settling defendant retains a right of contribution. And in circumstances such as those in the present case, it is unfair to the plaintiff, who is forced to transfer the benefit of his bargain with the settling defendants to the non-settling defendants. Finally, it is unfair to a settling defendant, if it is unable to secure a release from all liability because of the possibility of an action for contribution.

Moreover, the pro tanto rule discourages settlements, at least insofar as non-settling defendants have a right of contribution. A defendant has no incentive to settle with the plaintiff if it cannot cut off its liabilty—unless the defendant is willing to pay in settlement *more* than its proportionate share of the plaintiff's actual damages without discounting for the possibility of success at trial. On the other hand, if there is no right of contribution under the pro tanto approach, defendants will have a strong incentive to race to settle in order to avoid the risk of being burdened with a disproportionate share of the plaintiff's damages at trial. As this Court observed in *Reliable Transfer*, 421 U.S. at 408, however, there is no reason to follow a rule of law if its only virtue is to "yield[] quick, though inequitable, settlements."

Finally, the pro tanto approach has the potential to reward defendants for refusing to settle. In this case, for example, respondent River Don made a

deliberate decision to litigate to judgment rather than settle what the jury found to be a meritorious claim against it. Under the court of appeals' decision. River Don's refusal to settle paid off handsomely. Even though the jury found River Don to be responsible for $798,000 of petitioner's $2.1 million in damages, the pro tanto rule reduced its liability to $470,000—for no reason other than that petitioner was able to secure a large settlement from other defendants. Rather than permitting River Don thus to "benefit substantially from its intransigence or miscalculation in refusing to settle the case," the better rule would be to require each party "to accept whatever benefits or burdens flow from its decision" to settle or litigate. *Leger*, 592 F.2d at 1251. That better rule is the pro rata approach.

D. This Court's Decision In *Edmonds* v. *Compagnie Generale Transatlantique* Does Not Undermine The Pro Rata Rule

Courts that have declined to follow the pro rata approach in the admiralty setting have done so based largely on their reading of this Court's decision in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). See, *e.g.*, *Myers* v. *Griffin-Alexander Drilling Co.*, 910 F.2d 1252, 1256 (5th Cir. 1990); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1546 (11th Cir. 1987); see also *Joia* v. *Jo-Ja Service Corp.*, 817 F.2d 908, 914-917 (1st Cir. 1987), cert. denied, 484 U.S. 1008 (1988). In our view, however, *Edmonds* turned on the provisions of the particular statutory scheme at issue there, and should not be read as establishing generally applicable principles of maritime law. See *Associated Electrical Cooperative*, 931 F.2d at 1270-1271.

In *Edmonds*, a longshoreman was injured on a ship. He recovered worker's compensation benefits from his stevedore employer under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, which afforded him an absolute right to recover statutory benefits but barred him from seeking further damages from his employer in a tort suit.[16] In his later tort action against the shipowner, the jury apportioned 10% of the fault for the accident to the longshoreman, 20% to the shipowner, and 70% to the stevedore/employer. Under the venerable common law rule of joint and several liability, after the award was reduced by the longshore-

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[16] Under the LHWCA, the employee's exclusive remedy against his employer was that Act's benefits system. See *Edmonds*, 443 U.S. at 260-261. Prior to the 1972 amendments to the LHWCA, this Court had held that a longshoreman was entitled to a warranty of seaworthiness from the shipowner, "which amounted to liability without fault for most onboard injuries." *Id.* at 261 (citing *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 94 (1946)). The Court had further held that the shipowner could not circumvent the exclusiveness of the LHWCA remedy as against the longshoreman's employer by seeking contribution from the employer. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). The Court had also held, however, that the shipowner and stevedore could contractually agree that the latter would indemnify the shipowner for amounts paid to an employee as a result of the stevedore's breach of a warranty of workmanlike service. See *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In 1972 Congress amended the LHWCA to make clear that the shipowner could not be held liable for a longshoreman's injuries without fault, and that the stevedore/employer could not even agree to indemnify the shipowner for his liability. See *Edmonds*, 443 U.S. at 262.

man's 10% fault, the shipowner was left responsible for payment of the remaining 90% of the damages. The shipowner, however, sought to pay the injured longshoreman only its proportionate share of damages.

This Court held that the shipowner was liable for the full amount of the damages awarded to the longshoreman. In 1972, Congress had amended Section 905(b) of the LHWCA to provide that a longshoreman could not recover damages from a shipowner in the absence of fault on the latter's part, and that the longshoreman's employer could not be held directly or indirectly responsible for damages in excess of the statutory benefits. See 33 U.S.C. 905(b); *Edmonds*, 443 U.S. at 262-263. It was against this backdrop that the shipowner sought to have the Court reject the principle of joint and several liability in favor of a system of comparative fault. Because the stevedore/employer was statutorily shielded from further payments to the plaintiff, the issue in *Edmonds* was whether the shipowner or the injured longshoreman would bear the burden of the employer's negligence.

Although the Court in *Edmonds* "acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault," 443 U.S. at 271 (citing *Reliable Transfer, supra*), it concluded that it was "not as free as [it] would otherwise be to change" the law in the circumstances of that case.[17] "By now changing what * * * Congress understood to be the law" when it amended the LHWCA—and what Congress

[17] The Court first concluded that the 1972 amendments did not themselves modify the rule of joint and several liability. See *Edmonds*, 443 U.S. at 263-271.

"did not itself wish to modify"—the Court concluded that it "might knock out of kilter th[e] delicate balance" between the rights of longshore workers, stevedores and shipowners that had been drawn in the statute. 443 U.S. at 273.

In our view, *Edmonds* is inapposite in this case. Under the LHWCA regime at issue in *Edmonds*, Congress chose to subject the stevedore to absolute liability in return for limiting the benefits payable to the employee and exempting the stevedore from further liability. See 443 U.S. at 261. Moreover, neither the injured party nor the stevedore is permitted under the LHWCA to bargain over the terms of the stevedore's liability to its employee. Outside that context, however, the injured party *is* free to sue any alleged tortfeasors and *is* free to strike the best settlement bargain with them that he can. See *Associated Electric Cooperative*, 931 F.2d at 1271; *Tanker Robert Watt Miller*, 957 F.2d at 1580 n.4. Thus, unlike in the LHWCA context—where the Court determined in *Edmonds* that part of the statutory bargain was that the shipowner, rather than the injured party, was to bear the burden of the statutory limitation on the liability of the stevedore—there is no sound reason as a general matter not to hold both plaintiffs and defendants to the terms of their settlement bargain.

As Justice Blackmun noted in dissent in *Edmonds*, the Court's decision did not rest "on grounds of reason or fairness." *Edmonds*, 443 U.S. at 274 (Blackmun, J., dissenting). In this case, however, where no action by Congress requires the Court to "stay [its] hand," *Edmonds*, 443 U.S. at 273, the Court is free to adopt the rule that makes the most sense. As the Court acknowledged in *Edmonds*,

weighty policy reasons "support[] divi[ding] damages between parties before the court on the basis of their comparative fault." 443 U.S. at 271. *Edmonds* is thus entirely consistent with the Court's conclusion in *Reliable Transfer* that the most "just and equitable" system for allocating damages in maritime cases is in accordance with principles of comparative fault. See *Reliable Transfer*, 421 U.S. at 411. In this case, if no defendant had settled with petitioner, the damages would have been allocated on a proportional basis. That result should not change "simply because one or more of the potential defendants has settled with the injured party." 592 F.2d 1249.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
DAVID V. HUTCHINSON
Attorneys

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